

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA)
)
) Criminal No. 01-455-A
)
ZACARIAS MOUSSAOUI) UNDER SEAL

**RESPONSE TO MOTION OF UNITED STATES FOR CLARIFICATION REGARDING
THE APPLICABILITY OF THE PROTECTIVE ORDER FOR UNCLASSIFIED BUT
SENSITIVE MATERIAL AND LOCAL CRIMINAL RULE 57 TO INFORMATION
THAT MAY BE MADE PUBLIC TO CONGRESSIONAL PROCEEDINGS**

COME NOW Frank W. Dunham, Jr., Edward B. MacMahon, Jr., Gerald T. Zerkin, and Alan Yamamoto, standby counsel, and for their response to the above-referenced motion, request that the government's concern be addressed by vacating the protective order altogether and providing appropriate relief under Local Rule 57.

1. The Material Will Be Leaked (Disseminated) To The Media By The Congress

The best known ways to broadcast or disseminate a secret in Washington are by telephone, telegraph and "tell-it-to-Congress." The government's motion presumes that the Congress will maintain the confidentiality of any discovery information covered by the applicable protective order. This is a ridiculous assumption. Further, we are concerned about the government's request to "disseminate" that which it has already disseminated. The government admits that it has already provided substantial material covered by the protective order to the Congress. (Gov't Motion, Exhibit A, Letter from Daniel Bryant to Graham and Shelby dated May 31, 2002, p. 3-4) It further appears that the F.B.I. has been providing classified information to Congress as well. *Id.* While in this motion the government now vouches to the Court that these officials will maintain the secrecy of certain information, at the very same time, the F.B.I. is investigating all of the members of Senate

Select Committee on Intelligence, one of the two committees requesting “clarification” from the Court by the instant motion, for allegedly leaking classified information to the press. (Probe of Hill Leaks on 9/11 is Intensified, *The Washington Post*, August 24, 2002, attached hereto as Exhibit A.) Perhaps the government believes that the same persons who have allegedly leaked classified information in the face of explicit criminal penalties will now somehow be persuaded to maintain the confidentiality of unclassified information where there is no fear of criminal prosecution, but we don’t think so. Standby counsel assume that all of the information will be leaked. The attached news articles (Exhibit B) should be sufficient to support the reasonableness of this assumption. Thus, as this Court reviews this motion, it should be aware of what relief is implicitly requested by the government—the D.O.J. wants this Court to absolve it from the consequences to its employees and Mr. Moussaoui’s right to a fair trial arising from the “dissemination” to the media of information that everyone knows is certain to occur once that information is delivered to the Congress.

2. Standby Counsel Do Not Object To The Motion If The Protective Order Is Vacated And The Defense Is Given Leave To Correct The Leaks Emanating from the Prospective Herring

Since the government has already given the documents to Congress, the only person suffering actual prejudice as a result of the entry of the protective order at issue is Mr. Moussaoui who must continue to comply with it even though there will be no secrets to protect. The February 5, 2002, protective order has created difficulties for the defense as it relates to our ability to communicate to witnesses and experts. We are required, before we interview witnesses or speak to experts, to determine whether any information is covered by the February 5, 2002, protective order or is merely general discovery. When the government makes disclosure of certain information, it designates in the cover letter how the information is to be designated between general discovery and particularly

sensitive discovery, but does not provide that designation on the discovery that is printed from the CD-ROM. Appropriately marked hard copies of documents designated as “particularly sensitive discovery” were supposed to be provided under the protective order but have not been provided to date. Further, we have information in our heads which comes up from time to time and then we cannot use it because we lack certainty as to how we got it, *i.e.*, is it classified? particularly sensitive? It is impossible to tell without going back to the source of what is in our collective memories. This requires substantial expenditure of time to determine whether a particular document or piece of information is general or sensitive discovery, a process that now should not be necessary given the fact that the government has or is intending to provide all of this information to Congress which will no doubt make public anything not already public. In fact, it appears that the Congress is insisting to disseminate this material as it chooses (*see* Reply on Behalf of Congress). We therefore request that rather than rule on this motion as requested, the Court should simply vacate the February 5, 2002, order in its entirety. As a matter of fundamental fairness, there is no reason to burden defense counsel with protecting that which will very soon be in the public domain.¹

We also request relief from Local Criminal Rule 57. The government has to know, as we have said, that the release of information to the Congress is the functional equivalent of producing that same information to the press. It would be unfair to allow the government to provide information to Congress that it knows will be leaked and generate substantial press, most of it negative to Mr. Moussaoui, and simultaneously leave the defense, handcuffed by the protective Order and Rule 57, from responding.

¹ Counsel requests no modification or vacation of the order regarding classified material dated January 22, 2002.

Given the broad nature of the allegations in the Indictment, there is no way to restrict Congress in the manner that the government’s motion proposes, even if this Court could somehow restrict Congress. There is no factual issue regarding the planning and execution of the 9/11 attacks that does not concern Mr. Moussaoui, the only person charged with complicity in the 9/11 attacks. Mr. Moussaoui’s role in the offense, if any, is the central question in the case applicable to both phases of this capital prosecution. Indeed, the Court need look no further than Director Mueller’s proposed testimony to understand that all of this information relates to this case and that there is no way to parse the information by “subject matter” as proposed in this motion:

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Thus, the opening salvo in the Director’s “Remarks” is a direct assault on Mr. Moussaoui’s presumption of innocence and a clear statement that the government believes he is guilty. While not as egregious as the Attorney General’s claim that Mr. Moussaoui is the “face of evil,” there is no other way to read the statement other than as presuming that Mr. Moussaoui is a terrorist, that he had direct knowledge as to the 9/11 plot and that his knowledge was equivalent to the 19 deceased hijackers. His involvement in the planning and execution is presumed not “not addressed.” These

² We note here that counsel has requested that the Congress provide the defense, *inter alia*, the written testimony of Directors Tenet and Mueller that was given to Congress about the 9/11 attacks. (Letter attached as Exhibit C.) That request was denied in its entirety. (Letter attached as Exhibit D.) The defense hereby reiterates its position that any testimony provided by any knowledgeable witness to the Congress must be produced to the defense.

issues, however, are in dispute and it is upon their fair resolution that this case will turn. It is not puffery to state that it is upon the fair resolution of these issues that Mr. Moussaoui will live or die.

Seeking to limit a discussion about two hijackers, al-Hamzi and al-Midhar, meeting with Yazid Sufaat, while cutting off discussion about Mr. Moussaoui who, the government alleges, met with the same person in Malaysia, is impossible and pure folly. Discussion of Mr. Sufaat in Malaysia will necessarily involve his alleged involvement with Mr. Moussaoui, and, potentially, Mr. Bin al-Shibh. The entire discussion about Colleen Rowley and “Moussaoui investigation” plainly involves Mr. Moussaoui. Moreover, that discussion also presumes Mr. Moussaoui’s guilt because it falsely presumes that a search of Mr. Moussaoui’s computer could have provided information to stop the 9/11 tragedy. Furthermore, this would require calling Ms. Rowley as a witness, someone that Mr. Moussaoui also wants subpoenaed for his trial.

We therefore request that if Congress discloses or otherwise leaks information provided to it by the government, that the defense be allowed sufficient leeway under the Rule to rebut the leak.

3. Mr. Moussaoui Must Be Present For The Hearing

The defense is compelled to take the position that this is not an ancillary proceeding and that, as a result, Mr. Moussaoui must be in attendance. *United States v. Tipton*, 90 F. 3d 861 (4th Cir. 1996) and authorities cited therein. The government’s request may impact the jury pool in this case and thus affect his right to a fair trial. His appearance, we submit, is therefore necessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Response to Motion of United States for Clarification Regarding the Applicability of the Protective Order for Unclassified but Sensitive Material and Local Criminal Rule 57 to Information That May Be Made Public to Congressional Proceedings was served upon AUSA Robert A. Spencer, AUSA David Novak, and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314 via facsimile and by placing a copy BY HAND in the box designated for the United States Attorney's Office in the Clerk's Office of the U.S. District Court for the Eastern District of Virginia and via first class mail to Zacarias Moussaoui, c/o Alexandria Detention Center, 2001 Mill Road, Alexandria, VA 22314 this 26th day of August, 2002.

/S/

Frank W. Dunham, Jr.